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No. 93-2072

In The

Supreme Court of the United States

October Term, 1994

BILTMORE SQUARE ASSOCIATES, Et Al.,

Petitioners,

v.

CITY OF ASHEVILLE,

Respondent.

Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners challenging a municipal annexation made pursuant to a state statute have standing to challenge an annexation ordinance on the basis of an alleged violation of the Voting Rights Act of 1965 where the petitioners include five businesses and six individuals, none of whom are members of any racial or ethnic minority nor registered to vote within the municipality.

PARTIES TO THE PROCEEDING

Respondent agrees with petitioners' description of the parties to the proceeding, except that petitioners below included another individual whose name is Brent Williamson. His name is not included as a petitioner in this matter, but there is no notification that this party has no interest in the outcome of the petition.

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BRIEF IN OPPOSITION

NOW COMES the City of Asheville, North Carolina, a municipal corporation organized and existing under the laws of the State of North Carolina, by and through the undersigned counsel, and files this Brief in Opposition to the Petition for a Writ of Certiorari to review the judgment of the North Carolina Court of Appeals in this case.

STATEMENT

1. Respondent City of Asheville adopted an annexation ordinance on 4 June 1991, providing for the annexation into the City of Asheville, effective 31 July 1991, of an area within which petitioners herein own property.

Pursuant to N.C. Gen. Stat. sec. 160A-50, petitioners challenged the annexation, which challenge, pursuant to statutory provision, resulted in a stay of the annexation until there was a final judgment in the State appellate system. The trial court (Superior Court Division of the North Carolina General Court of Justice) and the North Carolina Court of Appeals upheld the annexation. The North Carolina Supreme Court denied a Petition for Discretionary Review of this matter. Pursuant to state law, the annexation became effective 30 June 1994.

2. Petitioners herein include two general partnerships which own a shopping mall in the annexation area as a joint venture, with one of the partnerships being an Ohio general partnership and the other being a North Carolina general partnership. The other petitioners include a Pennsylvania Business Trust, with a Delaware corporation as its parent corporation, and a Tennessee corporation, who own department stores and a hotel in the annexation area, and six individual petitioners, all of whom are white. None of the individual petitioners resided, as of adoption of the annexation ordinance, within the corporate limits of the City of Asheville and were not registered to vote in City of Asheville elections.

3. Respondent is not subject to the preclearance requirement of Section 5 of the Voting Rights Act of 1965 (hereinafter the "Voting Rights Act"). See the Appendix to Part 51 of Chapter 1 of Title 28 of the Code of Federal Regulations. Challenges of violations of the Voting Rights Act by respondent must be brought, therefore, under Section 2 of the Voting Rights Act.

4. Section 2 of the Voting Rights Act, codified as 42 U.S.C. sec. 1973, provides protection to those citizens of the United States whose right to vote has been denied or abridged on account of race or color when the political processes leading to nomination or election in a state or political subdivision are not equally open to participation by those citizens, based on the totality of circumstances, so that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice (Pet. App. 29).

5. The trial court found that petitioners include two general partnerships involved in a joint venture, with one of the partnerships being an Ohio general partnership; a Pennsylvania corporation (which petitioners have reported as being merged into a Pennsylvania Business Trust with a Delaware corporation as its parent corporation); a Tennessee corporation; and seven individual petitioners (Pet. App. 14). The trial court further found that all of the individual petitioners are white and that none of the individual petitioners were registered to vote within the City of Asheville at the time of the annexation (Pet. App. 14). The trial court concluded, based upon those findings and the evidence, that petitioners do not have standing in the annexation proceeding to challenge the annexation as violating the Voting Rights Act (Pet. App. 14-15).

6. The North Carolina Court of Appeals found that petitioners failed to show that they were asserting their own legal rights and interests and not those of third parties as none of the petitioners are a member of a racial or ethnic minority and none of the petitioners were registered to vote within the City of Asheville (Pet. App. 7-9).

The North Carolina Court of Appeals further determined that the annexation does not deny or abridge the right to vote on account of petitioners' race or color (Pet. App. 7-9). The North Carolina Court of Appeals decided that the trial court did not err in concluding that petitioners did not have standing to challenge the annexation proceeding as violating the Voting Rights Act (Pet. App. 7-9).

ARGUMENT

1. Section 2 of the Voting Rights Act only provides protection to those citizens of the United States whose right to vote has been denied or abridged on account of race or color when the political processes leading to nomination or election in a state or political subdivision are not equally open to participation by those citizens, based upon the totality of circumstances, so that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Petitioners are not within that protected class. Petitioners Biltmore Square Associates, a North Carolina joint venture; DeBartolo Asheville Associates, an Ohio general partnership; Seven Seas Partnership, a North Carolina general partnership; Crown American Corporation, a Pennsylvania corporation (now merged into Crown American Associates, a Pennsylvania Business Trust, which has as its parent corporation Crown Delaware Holding Company, a Delaware corporation); and Proffitt's Inc., a Tennessee corporation would clearly not have a right to vote and would not have standing to allege a violation of the Voting Rights Act in the annexation proceeding. The individual petitioners

would also not have standing as all of them are white and were not registered to vote in City of Asheville elections as of the time of the annexation.

2.a. In a separate North Carolina annexation case, the North Carolina Supreme Court held that the residents of an annexation area did not have standing to assert that there had been injury to residents of an area which had not been annexed. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E.2d 189 (1980), citing *Warth v. Seldin*, 422 U.S. 490 (1975). The petitioners therein contended that they could present evidence that policy declarations in the North Carolina annexation statutes had not been met in that a small, Black residential area had not been annexed by the City of Jacksonville, North Carolina. In addition to determining that the petitioners therein did not have standing, the North Carolina Supreme Court stated that if there were such a cause of action, it did not lie in a petition to review an annexation ordinance. 300 N.C. at 189, 265 S.E.2d at 191.

b. When residents of an extraterritorial jurisdiction area of the City of Winston-Salem, North Carolina asserted that they were being denied "equal voting rights," the Fourth Circuit Court of Appeals determined that they were not bona fide residents of the city having jurisdiction over that area and had no standing to assert that they were being denied "equal voting rights." *Garren v. City of Winston-Salem*, 463 F.2d 54 (4th Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972). While that case involved a claim brought under Section 1983 of the Civil Rights Act, it should prove instructive in this case.

c. The Seventh Circuit Court of Appeals has previously determined that those ineligible to vote have not experienced a dilution of their vote and are not parties to a Section 2 claim under the Voting Rights Act. *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989). The issue in *McNeil* was whether or not one counts total minority population or only those of voting age when examining an alleged violation of Section 2 of the Voting Rights Act. The Seventh Circuit Court of Appeals determined that only minorities of voting age could be parties to a Section 2 claim. 851 F.2d at 945. As petitioners in this annexation matter were not registered voters within the City of Asheville as of the time of annexation, they could not be parties to a Section 2 claim under the Voting Rights Act in a challenge to the annexation proceeding.

d. In its opinion, the North Carolina Court of Appeals cited a federal case which sets forth the test to establish standing in a challenge brought under the Voting Rights Act. *Newman v. Voinovich*, 789 F.Supp. 1410 (S.D. Ohio 1992), *aff'd*, 986 F.2d 159 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3041 (1993), citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). The *Valley Forge* test consists of a six-prong analysis and, in order to have standing, a party must meet all of the six prongs of the test. In this case, petitioners fail to meet at least the part of the test which requires that the plaintiff must assert his own legal rights and interests, not those of a third party. *Biltmore Square Associates, et al. v. City of Asheville*, 113 N.C. App. 459, 439 S.E.2d 211 (1994), *cert. denied*, 336 N.C.

314, ___ S.E.2d ___ (1994). Respondent respectfully contends that the individual petitioners would also fail under a separate prong which requires that the injury be redressed by the requested relief and that the business petitioners would fail to qualify under all or most of the six prongs.

3. Petitioners cite *Moore v. Swinson*, 58 N.C. App. 714, 294 S.E.2d 381 (1982) for the proposition that they can be deprived of their voting rights in all future City of Asheville elections if the area in which they own property is annexed. That case does not apply in this situation. It involved the City of Washington, North Carolina, which is subject to the preclearance requirements found in Section 5 of the Voting Rights Act. The City of Asheville, North Carolina, is not subject to those preclearance requirements.

In the City of Washington case, the plaintiffs therein sought the right to vote in a sewer bond referendum held after the effective date of the annexation, but before the annexation was precleared by the United States Attorney General. The North Carolina Court of Appeals only held that those residents would be precluded from voting in that specific election as the annexation had not yet been precleared. The North Carolina Court of Appeals did *not* hold that those residents could *never* vote in a future City of Washington election, as petitioners would contend, but would only be precluded from voting in the sewer bond referendum as the annexation had not been precleared prior to the date of the referendum. 58 N.C. App. at 718-719, 294 S.E.2d at 383. The North Carolina Court of Appeals also noted that the plaintiffs in *Moore* did not suffer abridgment of a fundamental right or injury by

their exclusion as voters from that particular and singular election. 58 N.C. App. at 719, 294 S.E.2d at 384.

4. Even if appropriate plaintiffs bring a successful challenge to show that the City of Asheville, somehow, is violating Section 2 of the Voting Rights Act, which the City of Asheville respectfully denies, the individual petitioners herein would not be forever deprived of the right to vote. In fact, if the City of Asheville were violating Section 2 of the Voting Rights Act, all of the registered voters within the City of Asheville would be subjected to the same remedy as the residents of this annexation area. In that event, neither these petitioners nor registered voters of the City of Asheville would be precluded from voting in *all future* City of Asheville elections once the violation had been remedied. Respondent is at a loss to determine how petitioners might somehow lose their right to vote in all future City of Asheville elections after the annexation has become effective. The North Carolina Court of Appeals correctly determined that these petitioners did not have standing to challenge this annexation based upon an alleged violation of Section 2 of the Voting Rights Act.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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